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NO. 91-1638

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDDIE EVANS,

PETITIONER,

VS.

THE CITY OF TULSA,
A MUNICIPALITY,

RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Should a Writ of Certiorari be issued to review a decision denying a free transcript when the Trial Court ruled the appeal presented no substantial question to warrant providing a free transcript even though the appeal was taken in good faith and was not frivolous.

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STATEMENT OF CASE

Eddie Evans, Petitioner herein, sued the City of Tulsa, Respondent herein, because of the circumstances related to the termination of Petitioner's employment with Respondent. After a nine day trial, the jury returned a verdict in favor of Respondent on all issues.

Petitioner filed a motion for a judgment notwithstanding the verdict. The motion was denied.

Petitioner filed a motion to file an appeal in forma pauperis. It was granted. Petitioner filed a motion requesting a free trial transcript be provided to him. That motion was denied.

Petitioner appealed his case to the Tenth Circuit Court of Appeals which affirmed the decisions of the trial court.

Petitioner now seeks a Writ of Certiorari related to his appeal.

MISSTATEMENTS OF LAW AND FACT

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States, Respondent advises the Court Petitioner has made the following Misstatements of Law and Fact:

1. In Petitioner's Brief, the "Question Presented" indicates the trial judge denied a free transcript even though he found the appeal was "non frivolous" according to 28 U.S.C. § 753 (f). The misstatement occurs because Petitioner fails to advise the Court the trial judge specifically ruled the appeal did not present a substantial question to justify providing a free transcript.

2. At page 4 of Petitioner's Brief, he alleges the Respondent admitted it terminated Petitioner's employment because he talked to the press and filed a civil rights suit. Petitioner also alleges Respondent admitted it failed to

give Petitioner an opportunity to respond to charges against him. These allegations are not true.

3. Also on page 4 of Petitioner's Brief, he alleges Respondent admitted violating an ordinance and state law by not preserving a record of termination proceedings. This is a misstatement because there is no such ordinance or state law.

PROPOSITION I

PETITIONER PRESENTED NO SUBSTANTIAL QUESTION TO JUSTIFY PROVIDING A FREE TRIAL TRANSCRIPT.

A free trial transcript is not required for every party that appeals a decision of a trial court. The only authority for providing a free transcript is 28 U.S.C. § 753 (f) which provides:

> "Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if

> the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question)."

The statute imposes two conditions before a free transcript is to be provided. First, a party seeking a free transcript must be indigent. Petitioner's indigence is not argued here, although it is submitted there has never been an opportunity for Respondent to dispute that issue.

The more important condition is that a free transcript is not to be provided unless the appeal "...is not frivolous (but presents a substantial question)...." 28 U.S.C. § 753 (f). Courts interpreting that language all emphasize that if a substantial question is not present a free transcript shall not be provided.

For example, a substantial question may exist when a court is faced with the

first judicial interpretation of a new statute. The court in Handley v.Union Carbide Corp., 622 F.Supp. 1065 (D.W.Va. 1985) made such a ruling when the case was unique and the court's ruling would provide operative definitions of terms and standards for workers compensation cases. The court provided a free transcript.

Substantial questions may exist in a procedurally unique case. For example, a trial judge denied a defendant's motion for a directed verdict and then granted defendant's motion for a judgment n.o.v. after a jury had ruled in favor of the plaintiff. In that situation the trial judge held the appellate court might more objectively decide the matter, Ortiz v. Greyhound Corporation, 192 F.Supp. 903 (D. Md. 1959). In the instant case there have been no such conflicting rulings by the trial judge.

The Petitioner has not presented any argument as to why any of the issues raised on appeal presented a substantial question. In this circumstance no free transcript should be provided. Jaffe v. United States, 246 F.2d 760 (2d Cir. 1957).

PROPOSITION II

AN APPEAL MAY BE TAKEN IN GOOD FAITH YET NOT INVOLVE A SUBSTANTIAL QUESTION.

Petitioner uses pages 7 through 15 of his Brief to argue the proposition that a substantial question must have been raised because the trial judge allowed the appeal to be filed in forma pauperis. Yet, Petitioner never identifies what substantial question exists. Petitioner abstractly asserts that "...sound logical deduction..." requires the conclusion that a substantial question exists because the

trial judge ruled the appeal was not "...frivolous...." (Petitioner's Brief at 9).

The trial judge was responding to two requests: Petitioner wanted the appeal fees waived and Petitioner wanted a free transcript. Recognizing that two issues were confronting the Judge, two fatal deficiencies in Petitioner's argument become apparent.

First, Petitioner quotes the word frivolous out of context. The appropriate context from the trial judge's ruling is as follows "...the appeal is taken in good faith and certifies that the appeal is not frivolous. However, the Court does not find that the appeal presents such a substantial question as to warrant the furnishing of a trial transcript...." Petitioner's Brief, Appendix E at 1 and 2.

Second, Petitioner confuses the tests for allowing an appeal to be taken in forma pauperis and for providing a free transcript. An indigent is allowed to file an appeal in forma pauperis if the appeal is in "...good faith...." 28 U.S.C. § 1915. However, a free transcript is not to be provided unless the appeal is "... not frivolous (but presents a substantial question)...." 28 U.S.C. § 753 (f).

Obviously, the trial judge believed Petitioner was taking the appeal seriously and the judge correctly waived the filing fees. However, it is equally obvious the trial judge specifically denied the existence of any substantial question to justify providing a free transcript. In such a situation the trial judge correctly denied the request for a free trial transcript. Maloney v. E. I. DuPont de Nemours & Co., 396 F.2d

939, (D.C. Cir 1967) cert. denied, 396 U.S. 1030, (1970) rehearing denied, 397 U.S. 930 (1970).

PROPOSITION III

ALLOWING A PETITIONER TO FILE AN APPEAL IN FORMA PAUPERIS DOES NOT NECESSARILY ENTITLE A PETITIONER TO A FREE TRIAL TRANSCRIPT.

The crux of Petitioner's argument is the allegation that sound logical deduction requires a free transcript be provided once it is determined an appeal can be filed in forma pauperis. The error in that argument, as stated above, is the test for waiving filing fees is different than the test used in deciding whether to provide a free transcript. Jaffe v. United States, 246 F.2d 760 (2d Cir. 1957). Petitioner ignores the requirement that the appeal must present a substantial question. Petitioner's argument cannot be accepted because it

would make the language of 28 U.S.C. § 753 (f) "...superfluous and meaningless...." Linden v. Harper & Row Inc., 467 F.Supp. 556 (S.D.N.Y. 1979).

Petitioner urges other propositions in his Brief but they do not address or affect the controlling law in this appeal. The law, is clear and unambiguous: no free trial transcript is provided when an appeal does not present a substantial question for appellate consideration.

CONCLUSION

The Petitioner has never identified any substantial question in this appeal. No such question was presented to the trial judge, to the judges of the Tenth Circuit Court of Appeals nor to the Justices of the Supreme Court of the United States. The only question presented is whether a free transcript should have been provided to Petitioner.

Because no substantial question has been raised a free transcript should not be provided. Therefore, the Petition for a Writ of Certiorari should be denied.

CITY OF TULSA, OKLAHOMA
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